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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 JOHN GORMAN,

11 Plaintiff,

12 vs.

13 WOLPOFF & ABRAMSON, LLP;
14 MBNA AMERICA BANK, N.A., and
Does 1 through 100, inclusive,

15 Defendants.
16

) CASE NO.: C-04-4507 JW
)
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)

) **NOTICE OF MOTION AND MOTION**
) **TO DISMISS COMPLAINT BY**
) **DEFENDANT MBNA AMERICA BANK,**
) **N.A.; MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **MOTION**

17 DATE: December 6, 2004
18 TIME: 9:00 a.m.
19 Courtroom: 8

20 The Honorable James Ware
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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 NOTICE IS HEREBY GIVEN, that on December 6, 2004, at 9:00 a.m., or as soon
3 thereafter as the matter may be heard before the Honorable James Ware, in Courtroom 8 of
4 the above-entitled Court, located at 280 South First Street, San Jose, California, Defendant
5 MBNA America Bank, N.A. ("MBNA") will and hereby does move this Court for an Order,
6 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the complaint
7 filed by plaintiff John Gorman ("Gorman") and each purported cause of action alleged
8 therein against MBNA, on the grounds that the complaint fails to state a claim upon which
9 relief may be granted. As demonstrated in the accompanying memorandum of points and
10 authorities, the complaint is subject to dismissal on the following grounds:

11 1. Plaintiff's First Cause of Action for Libel is preempted by the Fair Credit
12 Reporting Act, 15 U.S.C. § 1681 *et seq.* (the "FCRA") and therefore must be dismissed, with
13 prejudice, and without leave to amend.

14 2. Plaintiff's Second Cause of Action for alleged violations of section 1785.25 of the
15 California Civil Code is preempted by the FCRA and therefore must be dismissed, with
16 prejudice, and without leave to amend.

17 3. Plaintiff's Third Cause of Action for alleged violations of section 1681n of the
18 FCRA must fail since, based upon controlling Ninth Circuit authority, no private right of
19 action exists for alleged violations of a furnisher's duties under 15 U.S.C § 1681s-2(a).
20 Accordingly, this claim must be dismissed, with prejudice, and without leave to amend.

21 4. Plaintiff's Fourth Cause of Action for alleged violations of section 1681o of the
22 FCRA must fail since, based upon controlling Ninth Circuit authority, no private right of
23 action exists for alleged violations of a furnisher's duties under 15 U.S.C § 1681s-2(a).
24 Accordingly, this claim must be dismissed, with prejudice, and without leave to amend.

25 5. Plaintiff's Fifth Cause of Action for alleged violations of the Fair Debt Collection
26 Practices Act, 15 U.S.C. § 1692 *et seq.* (the "FDCPA") fails because MBNA is not a "debt
27 collector" within the meaning of the FDCPA. The claim must therefore be dismissed, with
28 prejudice, and without leave to amend.

1 This Motion is based upon this Notice of Motion and Motion, the accompanying
2 Memorandum of Points and Authorities filed herewith, the pleadings and records on file in
3 this action, and upon such other further evidence and argument that may be presented at the
4 hearing on this Motion.

5
6 DATED: November 1, 2004

WINEBERG, SIMMONDS & NARITA LLP
TOMIO B. NARITA

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10 By: _____/s/ _____

11 Tomio B. Narita
12 Attorneys for Defendants
13 Wolpoff & Abramson, L.L.P. and MBNA
14 America Bank, N.A.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2

3 **I. INTRODUCTION**

4 In this case, plaintiff (and counsel of record) John Gorman asserts a series of claims
5 against MBNA based upon MBNA's alleged failure to report accurate information about
6 Gorman's credit card debt to various credit reporting agencies. Gorman also alleges that
7 "defendants" made harassing phone calls to him in an effort to collect the debt. By this
8 motion, defendant MBNA seeks an Order, pursuant to Rule 12(b)(6) of the Federal Rules of
9 Civil Procedure, dismissing each of the five causes of action asserted against MBNA.

10 As demonstrated herein, all of Gorman's claims based upon MBNA's alleged
11 conduct in reporting inaccurate information to credit reporting agencies must fail. His first
12 two state law claims (for libel and for violations of section 1785.25 of the California Civil
13 Code) are expressly preempted by the FCRA. His third and fourth claims, for alleged
14 "wilful" and "negligent" violations of the FCRA, stem from MBNA's alleged failure to
15 furnish accurate information under section 1681s-2(a) of the FCRA. The Ninth Circuit has
16 already held that there is no private right of action for such claims. Finally, his fifth claim
17 for alleged violations of the FDCPA fails because MBNA is not a "debt collector" within the
18 meaning of the FDCPA.

19 All of Gorman's claims are barred as a matter of law, and it would be futile to grant
20 him leave to amend his complaint. Accordingly, MBNA respectfully requests that this Court
21 enter an Order dismissing the complaint, with prejudice, and without leave to amend.

22

23 **II. THE ALLEGATIONS OF THE COMPLAINT**

24 The complaint alleges that "in or about 2003" a dispute arose between Gorman and
25 MBNA with respect to certain charges that had been posted on Gorman's MBNA credit card
26 account. Complaint ¶ 7. According to Gorman, he notified MBNA in writing that the
27 charges in question were not legitimate and were disputed. *Id.* at ¶ 8. Gorman alleges that
28 MBNA temporarily removed the disputed charges from his account, but MBNA later re-

1 posted the disputed charges and refused to remove them, despite multiple requests from
2 Gorman. *Id.*

3 The complaint also alleges that “in spring 2004” Gorman discovered that defendants
4 were reporting “inaccurate and incomplete” information about him, and he allegedly asked
5 defendants and various credit reporting agencies to correct the “defamatory information.”
6 *Id.* at ¶ 12. Gorman claims that defendants have taken no corrective action and that they
7 “continue to report the debt as delinquent without indicating that the charges are disputed”
8 by Gorman. *Id.*

9 Significantly, the complaint does not allege whether (or when) MBNA was notified
10 by any credit reporting agency that Gorman disputed any charges. Gorman also does not
11 allege that, once notified by a credit reporting agency, MBNA failed to investigate his
12 dispute, or that MBNA’s investigation was incomplete or insufficient.

13 The pleading states that in “2003 and through late February 2004” the “defendants”
14 repeatedly telephoned Gorman at his residence and office and “made threatening and
15 harassing phone calls regarding the alleged debt” despite being requested by Gorman, both
16 orally and in writing, to cease and desist such calls. *Id.* at ¶¶ 10-11. Gorman does not
17 specify when he allegedly told “defendants” to stop calling him. Nor does Gorman identify
18 anything said by MBNA during any allegedly “threatening or harassing” phone call.

19 Based upon these skeletal allegations, the complaint purports to assert five separate
20 causes of action against MBNA: 1) the First Cause of Action for Libel, 2) the Second Cause
21 of Action for violation of section 1785.25 of the California Civil Code, 3) the Third Cause
22 of Action for violation of section 1681n of the FCRA, 4) the Fourth Cause of Action for
23 violation of section 1681o of the FCRA, and 5) the Fifth Cause of Action for violation of the
24 FDCPA. All of the claims fail as a matter of law.

1 **III. ARGUMENT**

2 **A. The First Cause of Action for Libel is Preempted by The FCRA**

3 In his First Cause of Action, Gorman asserts that MBNA's conduct in reporting
4 allegedly inaccurate information about his debt to credit reporting agencies after Gorman
5 disputed certain charges "constitutes libel" under California law. As this Court has
6 previously held, however, libel claims like Gorman's implicate conduct falling within the
7 subject matter of section 1681s-2(a) of the FCRA, and are therefore preempted by section
8 1681t(b)(1)(F) of the FCRA.¹ See *Davis v. Maryland Bank*, 2002 U.S. Dist. LEXIS 26468
9 (N. D. Cal. 2002). The First Cause of Action for libel must be dismissed.

10 Like Gorman, the plaintiff in *Davis* sought to pursue, *inter alia*, a common law
11 defamation claim based upon a credit card issuer's alleged reporting of inaccurate
12 information to a credit reporting agency concerning a disputed debt. *Id.* at *7. But Congress
13 enacted section 1681t(b)(1)(F) of the FCRA as part of its effort to create a "uniform scheme
14 governing the disclosure of credit information" and it would undermine Congress' intent to
15 allow consumers to pursue common law tort claims that implicate the same subject matter of
16 the FCRA. *Id.* at *41. The conduct challenged in *Davis* (like the conduct challenged by
17 Gorman here) is regulated by section 1681s-2(a)(1)(A) which provides that a "person shall
18 not furnish any information relating to a consumer reporting agency if the person knows or
19 consciously avoids knowing that the information is inaccurate." *Id.* at *37. The FCRA
20 preempts any state law claim falling within the "subject matter" regulated by section 1681s-

22 ¹ Section 1681t of the FCRA, which includes the preemption provisions at issue in this action,
23 provides in relevant part:

"No requirement or prohibition may be imposed under the laws of any State--

24 (1) with respect to any subject matter regulated under--

25 (F) section 1681s-2 of this title, relating to the responsibilities of persons who
furnish information to consumer reporting agencies, except that this paragraph
26 shall not apply--

27 (i) with respect to section 54A(a) of chapter 93 of the Massachusetts
Annotated Laws (as in effect on September 30, 1996); or

28 (ii) with respect to section 1785.25(a) of the California Civil Code (as in
effect on September 30, 1996)."

2 of the statute. *Id.* at *36-37. Since the alleged defamation was based on “the precise conduct which is proscribed under section 1681s-2(a)-(b)” (*id.* at 44) the *Davis* court held the claim was “preempted under section 1681t(b)(1)(F).” *Id.* at *44, 46.²

Here, as in *Davis*, Gorman seeks to pursue a defamation claim against MBNA based upon its alleged reporting of inaccurate information to credit reporting agencies after 2003 when MBNA received notice of Gorman’s dispute. Complaint ¶¶ 7-8. But this alleged conduct by MBNA is the same “subject matter” governed under section 1681s-2(a)(1)(A) of the FCRA. Accordingly, Gorman’s libel claim is preempted by section 1681t(b)(1)(F) of the FCRA and it must be dismissed.

B. The Second Cause Of Action For Alleged Violations of Section 1785.25 of the California Civil Code is Preempted by The FCRA

In his Second Cause of Action, Gorman alleges that MBNA provided “incomplete and inaccurate” information about him to consumer credit reporting agencies in violation of section 1785.25 of the California Civil Code, which is part of the California Credit Reporting Agencies Act (the “CCRAA”). This Court has repeatedly held, however, that a consumer cannot pursue a private right of action under the CCRAA because sections

² While it appears that no circuit court has ruled on whether a defamation claim of this type is preempted by the FCRA, numerous other district courts have reached the same result. *See Alkagi v. Nationscredit Fin. Servs. Corp.*, 196 F. Supp.2d 1186, 1194-95 (D. Kan. 2002)(defamation claim based upon conduct arising after receipt of notice of dispute was preempted by section 1681t(b)(1)(F)); *Malm v. Household Bank*, 2004 WL 1559370, at *6 (D. Minn. 2004)(*slip copy*) (same); *Riley v. General Motors Acceptance Corporation*, 226 F. Supp. 2d 1316, 1322-25 (S. D. Ala. 2002) (same); *Bank One v. Colley*, 294 F. Supp. 2d 864, 869 (M.D. La. 2003) (same); *Hasvold v. First USA Bank, N.A.*, 194 F. Supp.2d 1228, 1239 (D. Wyo. 2002) (holding that “all” state causes of action relating to the responsibilities of furnishers of information are preempted by section 1681t(b)(1)(F)); *Purcell v. Universal Bank, N.A.*, 2003 WL 1962376, *5 (E.D. Pa. 2003) (same). The *Davis* court was aware of only one case holding that common law tort claims did not fall within the preemption provided by section 1681t(b)(1)(F). *Davis*, at *40 (citing *Dornhecker v. Ameritech Corp.*, 99 F. Supp. 2d 918, 931 (N.D. Ill. 2000)). There have been others. *See, e.g., Carlson v. TransUnion*, 259 F. Supp. 2d 517, 521 (N. D. Tex. 2003); *Jeffery v. TransUnion*, 273 F. Supp. 2d 725 (E.D. Va. 2003).

1 1785.25(g) and 1785.31 of the California Civil Code are preempted by section
 2 1681t(b)(1)(F) of the FCRA. *See Lin v. Universal Card Services Corporation*, 238 F. Supp.
 3 2d 1147, 1152 (N. D. Cal. 2002); *Quigley v. Pennsylvania Higher Education Assistance*
 4 *Agency*, 2000 WL 1721069, at *3 (N. D. Cal. 2000). Thus, the Second Cause of action must
 5 be dismissed.

6 The plaintiff in *Lin* alleged that a credit card issuer had inaccurately reported
 7 information about him to credit reporting agencies in violation of section 1785.25(a) of the
 8 California Civil Code. *Lin*, 238 F. Supp. 2d at 1149. This Court acknowledged in *Lin* that
 9 section 1785.25(a) of the California Civil Code was expressly exempted from the
 10 preemptive effect of section 1681t(b)(1)(F)(ii) of the FCRA. *Id.* at 1151. However, the
 11 Court also noted that the two sections of the California Civil Code which confer a private
 12 right of action to consumers for violations of the CCRAA (namely, sections 1785.25(g) and
 13 1785.31) were not exempted from preemption. *Id.* at 1152-53. As a result, this Court
 14 dismissed the plaintiff's section 1785.25 claim. *Id.* at 1153. *Accord Quigley*, 2000 WL at
 15 *3 (holding that any private right of action under the California Civil Code based upon the
 16 conduct of a furnisher of information is preempted by the FCRA).

17 Here, as in *Lin* and *Quigley*, Gorman seeks to pursue a section 1785.25 claim against
 18 MBNA based upon MBNA's alleged conduct in providing "incomplete and inaccurate"
 19 information about him to various consumer credit reporting agencies. Complaint ¶ 19. This
 20 claim is expressly preempted by section 1681t(b)(1)(F) of the FCRA and must fail.

21
 22 **C. The Third And Fourth Causes of Action For Alleged Violations of The**
 23 **FCRA Fail Because There Is No Private Right of Action Based On A**
 24 **Furnisher's Alleged Breach of Its Duty To Accurately Report To A Credit**
 25 **Reporting Agency**

26 In his Third and Fourth Causes of Action, Gorman alleges that MBNA "wilfully"
 27 and/or "negligently" violated its duties under the FCRA when MBNA furnished information
 28 about him to credit reporting agencies. Complaint ¶¶ 27, 32. Both claims must fail,
 however, since the Ninth Circuit has already determined that no private right of action exists

1 for alleged violations of a furnisher's duty under section 1681s-2(a) of the FCRA to
 2 accurately report information to credit reporting agencies. *See Nelson v. Chase Manhattan*
 3 *Mortgage Corp.*, 282 F.3d 1057, 1059 (9th Cir. 2002).

4 In *Nelson*, the plaintiff claimed that a bank violated the FCRA when the bank
 5 mistakenly reported to credit reporting agencies that his loan had been discharged in
 6 bankruptcy. *Nelson*, 282 F.3d at 1058. The Court observed that furnishers have an
 7 affirmative duty to report complete and accurate information to credit reporting agencies
 8 under section 1681s-2(a) of the FCRA. *Id.* at 1059. However, *Nelson* recognized that two
 9 other subsections of the FCRA (sections 1681s-2(c) and 1681s-2(d)), expressly provide that
 10 there is no private right of action to enforce the obligations established by section 1681s-2(a)
 11 of the FCRA. *Id.* A furnisher's duties under section 1681s-2(a) of the FCRA must be
 12 exclusively enforced by the federal and state officials identified in the statute. *Id.* at 1059.

13 Here, like the plaintiff in *Nelson*, the allegations of Gorman's Third and Fourth
 14 Causes of Action clearly fall within the ambit of MBNA's alleged duties under section
 15 1681s-2(a) of the FCRA. Gorman alleges that MBNA willfully and negligently failed "to
 16 comply with the requirements of the FCRA with regard to the furnishing of information
 17 about plaintiff." Complaint ¶¶ 27, 32. Under *Nelson*, there is no private right of action to
 18 enforce MBNA's section 1681s-2(a) duties, and these claims must also be dismissed.

19
 20 **D. The Fifth Cause of Action Fails Since MBNA is Not a "Debt Collector"**
 21 **Within The Meaning of The FDCPA**

22 In his Fifth Cause of Action, Gorman alleges that "defendants" violated various
 23 provisions of the FDCPA (15 U. S. C. §1692 *et seq.*) when they allegedly "repeatedly and
 24 knowingly" contacted Gorman at home and at work in a manner that was "harassing,
 25 threatening, abusive, oppressive, and annoying." Complaint ¶ 35. The claim must fail,
 26 however, since MBNA is a creditor, not a "debt collector" within the meaning of the Act.

27 The FDCPA expressly limits its application to the conduct of a "debt collector" which
 28 is defined as:

any person who uses any instrumentality of interstate commerce or the mails in any business the principle purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or *due another*.

See 15 U.S.C. §1692a(6)(emphasis added); *see also* *Montgomery v. Huntington Bank*, 346 F.3d 693, 699 (6th Cir. 2003)(noting agreement among federal courts that “a creditor is not a debt collector for the purposes of the FDCPA and creditors are not subject to the FDCPA when collecting their accounts.”). It is undisputed that Gorman is alleging that MBNA was the creditor that owned his debt. Complaint ¶¶ 4, 7-8. Since the FDCPA applies to “debt collectors” but not to creditors like MBNA that are attempting to collect on their own debts, the Fifth Cause of Action must be dismissed.

IV. CONCLUSION

For each of the foregoing reasons, defendant MBNA respectfully requests that this Court enter and Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the claims asserted against MBNA, with prejudice, and without leave to amend.

DATED: November 1, 2004

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By: _____/s/_____

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